EXHIBIT 11
DATE 2/18/09
HB 502

Statement of PPL Montana
Before the Natural Resources Committee
Of the Montana House of Representatives
In Opposition to House Bill 502
February 18, 2009

Mark Lambrecht, Manager, Regulatory Affairs
208 N. Montana Avenue, Ste. 204
Helena, Montana 59601
(406) 422-1092

Mr. Chairman and members of the Committee:

I'm Mark Lambrecht, Manager of Regulatory Affairs for PPL Montana—operator of the Colstrip Steam Electric Station. I'm here on behalf of PPL Montana and the co-owners of the Colstrip plant, including Avista Corporation, NorthWestern Energy, PacificCorp, Portland General Electric and Puget Sound Energy. PPL also owns and operates the J.E. Corette Steam Electric Station in Billings and eleven hydroelectric facilities in Montana.

Our opposition to this bill is limited to three points:

1) The Montana Board of Oil and Gas Conservation, rather than the Board of Environmental Review, should have primary authority on this issue. The Board of Oil and Gas already has expertise and many of the necessary rules in place to administer a sequestration permitting program.

2) This bill assigns liability to the sequestration permit holder for 75 years following closure of a well. Geologic carbon sequestration requires permanent storage of carbon dioxide. This bill should assign liability after that period to the State of Montana to protect public health and the environment in the long term.

3) The Montana Legislature should conduct a thorough legal analysis before assigning ownership of pore space. Assigning ownership to the State of Montana could very well violate the property rights of surface or mineral owners.

For these reasons, we ask that you give this legislation a "do not pass" recommendation.

Thank you for the opportunity to comment.

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CLAIRA GILREATH
CLERK OF DISTRICT COURT
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MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana non-profit corporation, and THE MONTANA FREEDOM OF INFORMATION HOTLINE, INC., a Montana non-profit corporation, Plaintiffs, vs. MONTANA DEPARTMENT OF STATE LANDS, a Department of the State of Montana, Defendant, and THE MONTANA MINING ASSOCIATION, Intervenor-Defendant.	**Cause No. CDV-92-020** **MEMORANDUM AND ORDER**

The issue before the Court is whether Section 82-4-306, MCA, is unconstitutional because it violates Article II,

Section 9, of the Montana Constitution. The issue has been fully briefed and is ready for decision.

BACKGROUND

On November 25, 1991, James Jensen, executive director of the Montana Environmental Information Center (MEIC), wrote Sandy Olsen, chief of the Hard Rock Bureau of the Montana Department of State Lands (DSL), requesting information about four exploration licenses issued by DSL for mining exploration on private land. In his letter Jensen stated that he was especially interested in any restrictions or requirements, including performance bonds, which might have been placed on the licensees relating to hazardous materials management, air and water quality protection and reclamation. He also requested a copy of the environmental assessment DSL had prepared on the exploration permit for the Montanore project, a large exploration tunnelling project adjacent to and beneath the Cabinet Mountains Wilderness Area.

Relying on the provisions of Section 82-4-306, MCA, Olsen wrote Jensen on November 26, 1991, stating that she could not approve his request to look at specific exploration files concerning private lands. Also on November 26, 1991, Jensen received a press release from Noranda Minerals Corp., owner of the Montanore project, stating that Noranda was interrupting its exploration tunnelling activities at the Montanore project in

response to an "advisory issued by the Montana Department of State Lands requiring that Noranda Minerals initiate immediate action to reduce nitrate levels in the water of Libby Creek."

Plaintiffs filed this action on January 6, 1992. On January 9, 1992, Noranda Minerals' project director for the Montanore project wrote DSL and gave DSL a partial waiver of confidentiality as to the Montanore project. The letter stated that the file does not contain proprietary geological information.

DISCUSSION

Section 82-4-331(1), MCA, provides that no one may engage in exploration without first obtaining an exploration license from DSL. Under Section 82-4-332, MCA, an application must "include an exploration map or sketch in sufficient detail to locate the area to be explored and to determine whether significant environmental problems would be encountered." The applicant must also submit a plan of operation which provides a detailed description of the proposed exploration activities; a description of the environment potentially affected by the exploration activities; and a reclamation plan.

After DSL determines that an application is complete, it evaluates the information submitted; does a site inspection; and prepares an environmental assessment. As part of its review, DSL determines whether conditions should be placed on a

license. Also, a reclamation bond needs to be posted prior to issuance of any exploration license. After a license has been issued, DSL monitors the licensee to insure compliance with the license requirements and state laws. As part of the monitoring process, the licensee may be required to submit periodic reports to DSL. If it appears that a licensee is not in compliance with its license, DSL may issue a notice of non-compliance and order the licensee to take corrective action. DSL's file on a particular license may contain correspondence, notes from telephone calls and meetings and citizens' complaints.

Section 82-4-306, MCA, provides:

> **Confidentiality of application information.** (1) Except as provided in subsections (2) and (3), <u>any information obtained</u> by the board or by the director or his staff by virtue of applications <u>for exploration licenses and all information obtained from small miners is confidential</u> between the board and the applicant, except as to the name of the applicant and the county of proposed operation; provided that all activities conducted subsequent to exploration and other associated facilities shall be public information and conducted under an operating permit.
>
> (2) Any information referenced in subsection (1) is properly admissible in any hearing conducted by the director, the board, appeals board, or in any judicial proceeding to which the director and the applicant are parties and is not confidential when a violation of this part or rules adopted under this part has been determined by the department or by judicial order.
>
> (3) The department may disclose

> information obtained by the board, the commissioner, or department staff from exploration license applications and from small miners for exploration or mining on state and federal lands that identifies the location of exploration and mining activities and that describes the surface disturbance that is occurring or projected to occur. The department may not disclose a licensee's or small miner's proprietary geological information.
>
> (4) Failure to comply with the secrecy provisions of this part is punishable by a fine of up to $1,000. (Emphasis supplied.)

Plaintiffs contend that this statute, which requires DSL to keep confidential all information obtained by it from applicants for exploratory licenses or from small miners, irreconcilably conflicts with Article II, Section 9, of the Montana Constitution which provides:

> **Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The Montana Supreme Court has developed a two-part balancing test to determine whether a person has a constitutionally protected privacy interest. Montana Human Rights Div. v. City of Billings, 199 Mont. 434, 442, 649 P.2d 1283, 1287 (1982). First, there must be a determination as to whether a person has a subjective or actual expectation of privacy. The second part of the test is a determination of whether society

would recognize that expectation as reasonable. In applying the test to the Montana Open Meeting Act, the court stated:

> However, the right to know is not absolute. The more specific closure standard of the constitutional and statutory provisions requires this Court to balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know *may* outweigh the right of individual privacy, depending on the facts.
>
> Before balancing these interests, however, it must be determined more precisely what interests are at stake. This determination includes consideration of various facets of the public interest and is required by the language of the right to know provision, which calls for a balancing of the "demands of individual privacy" and the "merits of disclosure."

Missoulian v. Board of Regents, 207 Mont. 513, 529, 675 P.2d 962, 971 (1984).

Here, the interest at stake is proprietary geological information. In Mountain States Tel. and Tel. Co. v. Department of Pub. Serv. Regulation, 194 Mont. 277, 634 P.2d 181 (1981), the court held that corporate trade secrets are entitled to constitutional protection. The court then applied the balancing test to determine under what conditions trade secrets could be publicly disclosed.

In Belth vs. Bennett, 227 Mont. 341, 740 P.2d 638 (1987), the court upheld the constitutionality of Section 33-1-

412(5) which provides that the commissioner of insurance "may withhold from public inspection any examination or investigation report for so long as he deems such withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest." The court found that the statute is an alternative expression of the constitutional privacy exception found in Article II, Section 9, of the Constitution, and that the commissioner could only invoke the statute when the demand of individual privacy clearly exceeded the merits of public disclosure. The court went on to note that the statute authorizes the commissioner to make an initial decision as to whether the privacy rights outweigh the need for public disclosure. Belth at 346, 740 P.2d at 641.

In this case Plaintiffs are not seeking proprietary geological information. DSL's files, however, contain other information which is not proprietary geological information. The file on the Montanore project, one of those requested by Jensen, does not contain any proprietary information.

Unlike the statute at issue in Belth, Section 82-4-306, MCA, does not authorize DSL to make an initial determination of whether the privacy rights of the applicant outweigh the need for public disclosure. Rather, the statute requires DSL keep all information confidential unless the applicant gives DSL a waiver. This is in direct conflict with Article II, Section

9, and the cases which have interpreted it.

DSL argues that the legislature has performed the required constitutional balancing test. The Court disagrees for a number of reasons. First, the statute was enacted in 1971, prior to the adoption of the Constitution. Second, the legislative history does not support a conclusion that the legislature applied the balancing test. Third, Article II, Section 9, is a self-executing provision. Allstate Ins. Co. v. City of Billings, 239 Mont. 321, 780 P.2d 186 (1989). Fourth, in applying the balancing test it is necessary to look at "the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure." Missoulian at 529, 675 P.2d at 971. Fifth, as the court noted in Allstate, the constitutional provisions control the legislature, not vice versa.

For the foregoing reasons, the Court concludes that the blanket provision of Section 82-4-306, MCA, which requires DSL to keep all information confidential, is unconstitutional on its face. This does not mean that everything in DSL's files should now be made available for public inspection. Proprietary geological information is still entitled to protection in accordance with Article II, Section 9. In determining whether information in its files should be made available for public

inspection, DSL should apply the balancing test established by the decisions of the Montana Supreme Court. If after applying the test there is a dispute as to whether information should be released, the affected parties can petition this Court for appropriate relief.

The only remaining issue is whether mandamus is the proper remedy. Mandamus lies only to compel the performance of a clear legal duty. Section 27-26-102, MCA; State *ex rel.* Swart vs. Casne, 172 Mont. 302, 564 P.2d 983 (1977). The issue here is whether there was a clear legal duty on the part of DSL to make the requested files available to Jensen for inspection. Under the facts of this case, the Court concludes that DSL did not have a clear legal duty to make the files available for inspection and therefore mandamus is not the proper remedy.

Section 82-4-306, MCA, specifically prohibited DSL from releasing any information in the files. There is also a strong presumption that a statute is constitutionally valid. McClanathan v. Smith, 186 Mont. 56, 65, 606 P.2d 507, 512 (1980). Furthermore, "it is the duty of the courts to uphold the constitutionality of legislative enactments if such can be accomplished by reasonable construction." North Cent. Services, Inc. v. Hafdahl, 191 Mont. 440, 444, 625 P.2d 56, 58 (1981). Finally, the Court notes that failure to comply with the secrecy provisions of Section 82-4-306, MCA, is punishable by a fine of

up to $1,000. For these reasons, it was not unreasonable for DSL to refuse Plaintiffs' request to review the files.

For these reasons,

IT IS ORDERED that the foregoing shall constitute the declaratory judgment of this Court and that judgment should be entered in favor of Plaintiffs in accordance with this Memorandum and Order.

DATED this 25th day of September, 1992.

District Court Judge

pc: Karl J. Englund
Tommy H. Butler
Joe Seifert

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CLERK OF DISTRICT COURT
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